No. 14925.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

YIP MIE JORK,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

BRIEF FOR APPELLEE.

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TABLE OF AUTHORITIES CITED

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BRIEF FOR APPELLEE.

Jurisdiction of the Court.

Appellant claimed jurisdiction in the Court below pursuant to Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 1172, 8 U. S. C. A. §903 [R. 3].[1] The District Court concluded that it had jurisdiction [R. 17]. It is the position of appellee that the Court below was without jurisdiction of the subject matter for the reason that appellant was not in fact denied a right or privilege as a national of the United States upon the ground that he was not such a national before his Complaint was filed or

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[1]"R" refers to the printed Transcript of Record. "Br." refers to Appellant's Brief.

before the repeal of Section 503 of the Nationality Act of 1940.[2]

The District Court found that the requisite denial had occurred because of appellee's unreasonable delay in passing upon appellant's application for passport [R. 16]. While such delay, if unreasonable, might well effect a denial of a right or privilege of a United States national, it is difficult to perceive how such a denial would be based, in the language of Section 503, "upon the ground that he is not a national of the United States." So long as appellee had not passed upon appellant's application for passport, *no determination of appellant's nationality was made, either adversely or favorably.*

However, since the decision of this Court in *Chin Chuck Ming v. Dulles,* 225 F. 2d 849 (C. A. 9, 1955), where a similar period of delay was involved, is adverse to appellee's position, the jurisdictional issue will not be extensively briefed in this case.[3]

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[2]Section 503 was repealed by Section 403(a)(42) of the Immigration and Nationality Act, 66 Stat. 280 effective December 24, 1952 (see Section 407 of the Immigration and Nationality Act, 66 Stat. 281). A more restrictive provision is now contained in Section 360(a) of the Immigration and Nationality Act, 66 Stat. 273, 8 U. S. C. A. §1503(a).

[3]In *Chin Chuck Ming* there was a delay of 15 months and 16 days between the date an affidavit-application was filed and the date the complaint was filed. In the instant case there was a delay of 15 months and 18 days between the date a formal application for passport was filed and the date appellant's complaint was filed. The affidavit of appellant's alleged half-brother contained in Plaintiff's Exhibit 1 is dated August 24, 1950, and if this affidavit is considered, the delay in the present case is considerably increased. In other nationality cases pending before this Court, where the period of delay is shorter, counsel for appellee contemplates a more extensive briefing of the jurisdictional issue. See, for example, *Tam Suey Jin v. Dulles,* No. 14947.

The judgment of the Court below being a final decision, this Court has jurisdiction of the present appeal from that decision under the provisions of 28 United States Code, Section 1291. However, the jurisdiction of this Court ends if it finds that the District Court was without jurisdiction of the subject matter.

Statement of the Case.

Appellant brought action in the Court below seeking a judgment declaring him to be a national of the United States [R. 3-6]. He alleged birth in China on February 22, 1928, and claimed to have derived citizenship and/or nationality through his alleged father, Yip Dock, under the provisions of Section 1993, Revised Statutes of the United States [R. 4, 6].

Trial was held on May 2, 1955 and May 3, 1955, at which appellee conceded the citizenship of appellant's alleged father, Yip Dock [R. 28], and at which three witnesses testified on behalf of appellant [R. 23-101]. After trial, the Court found that appellant had failed to sustain his burden of proving that he is the lawful blood son of Yip Dock [R. 11] and on June 2, 1955 judgment was entered accordingly [R. 12-13].

On July 13, 1955, upon appellant's motion for a new trial, the District Court vacated the judgment entered on June 2, 1955 and ordered the case reopened for the purpose of receiving additional evidence [R. 13-14].

Reopened hearings were held on July 18, 1955 and on July 26, 1955, at which appellant offered the testimony of five additional witnesses. After the conclusion of the reopened hearings, the District Court again found that appellant had failed to sustain his burden of proving

that he is the lawful blood son of Yip Dock, and hence had failed to prove that he was a national or citizen of the United States [R. 17]. On August 11, 1955, judgment was again entered in favor of appellee [R. 18-20]. The present appeal is from the latter judgment [R. 20]. Aside from the jurisdictional issue previously disposed of, the only issue presented by this appeal is as follows:

1. Is the finding of the District Court that appellant failed to sustain his burden of proving that he is the lawful blood son of Yip Dock clearly erroneous?

Statutes Involved.

Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 1172, 8 U. S. C. A. §903, provided:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country

in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the appellant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided."

Section 1993 of the Revised Statutes of the United States, on February 22, 1928, the date of appellant's alleged birth, provided:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

ARGUMENT.

I.

Summary.

The burden rested upon appellant to prove his claim to citizenship, that is, to prove that he was the lawful blood son of Yip Dock. This burden of proof was an ordinary one; however, the finding of the Court below that appellant had "failed to present sufficient credible evidence to sustain his burden of proving that he is the lawful blood son of Yip Dock" [R. 17] was not clearly erroneous so as to authorize its being set aside by this Court.

Appellant did not present to the District Court any documentary evidence of sufficient antiquity to attest to the bona fides of his claimed relationship. The documents introduced were of such recent origin that it is not unreasonable to infer that they were obtained for the purpose of establishing appellant's claim to citizenship.

The testimony of the three witnesses presented by appellant at the original trial not only lacked probative value to establish his claimed relationship, but constituted affirmative evidence negating its existence. None of these witnesses saw Yip Mie Jork during his early childhood; and if the periods of time during which all three witnesses visited with him were combined, the total would amount to no more than 7 days and 15 minutes.[4] Yip

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[4]Yip Share Leung—2 or 3 days [R. 51]; Yip She Mang—3 or 4 days [R. 55-56]; Peter Fong—15 minutes [R. 66].

Share Leung, who claimed to be appellant's half brother, who initiated his claim to citizenship, and who would normally be expected to possess some knowledge of the claim, did not see appellant until the latter was 22 years of age. Yip Share Leung did not communicate with appellant or with his own stepmother between 1931 and 1947, a period of 16 years; nor did he even visit the "home village" during his trip to China from 1947 to 1949.

The findings of the District Court show that it did not believe, in many respects, the testimony of the witnesses presented by appellant at the reopened hearings. The remarks of the Court are not inconsistent with these findings; since at the close of the reopened hearings the Court below made it clear that the credibility of the witnesses was an important factor in its decision. Assuming, however, that the Court's remarks conflict with its findings, the latter should prevail.

There was an adequate basis for the finding of the district court that the testimony of the witnesses was, in many respects "improbable and unworthy of belief": the apparent tendency of the witness Leong Lan Gin to volunteer testimony favorable to appellant; the impeachment of the testimony of witness Chew Jock concerning his purported visit to Yip Dock's home and his introduction to Yip Dock's wife [Deft. Ex. A]; the evasiveness of Chin Shee when confronted with a statement signed by him which would have effectively impeached his testimony [Deft. Ex. B for identification]; together with the demeanor of the witnesses, which is always in evidence.

II.

The Finding of the District Court That Appellant Failed to Sustain His Burden of Proving That He Is the Lawful Blood Son of Yip Dock Is Not Clearly Erroneous.

A. Burden of Proof and Scope of Review.

Appellant properly acknowledges that the burden rested upon him to establish his claim to citizenship, that is, to prove that he is the lawful blood son of Yip Dock (Br. 6; *Ly Shew v. Dulles,* 219 F. 2d 413, 416 (C. A. 9, 1954); *Law Don Shew v. Dulles,* 217 F. 2d 146, 147 (C. A. 9, 1954); *Chow Sing v. Brownell,* 217 F. 2d 140, 142 (C. A. 9, 1954)).

Appellee, in turn, concedes that the burden which rested upon appellant was the burden of proof ordinarily applicable in civil actions (*Ly Shew v. Dulles, supra; Lee Shew v. Brownell,* 219 F. 2d 301 (C. A. 9, 1955); *Chow Sing v. Brownell, supra*). The District Court was fully aware of the proper burden of proof, particularly in view of the reversal by this Court of its decision in *Mar Gong v. McGranery,* 109 Fed. Supp. 821 (S. D. Calif., 1952), reversed in *Mar Gong v. Brownell,* 209 F. 2d 448, 453 (C. A. 9, 1954).

Appellee disagrees, however, with the implication in appellant's brief that he is excused to some unspecified degree from his ordinary burden of proof "because of the appellee's refusal to allow" him to come to the United States (Br. 5). Congress, in authorizing the issuance of certificates of identity to persons instituting actions under Section 503 of the Nationality Act of 1940 in order that they might be admitted to the United States, conditioned such authorization upon *"submission of a sworn*

application showing that the claim of nationality . . . is made in *good faith* and has a *substantial basis*" (Emphasis added); and the ultimate decision as to whether a certificate of identity should be issued was conferred by Congress upon the Secretary of State (Sec. 503 of the Nationality Act of 1940, 54 Stat. 1171, 1172, 8 U. S. C. A. §903; *Dulles v. Lee Gnan Lung,* 212 F. 2d 73, 75-76 (C. A. 9, 1954)).

In the case at bar, there is no evidence that appellant submitted a sworn application for a certificate of identity. Plaintiff's Exhibit 1, consisting of the passport file relating to appellant, does not contain such an application. If no application was made, clearly appellant would not have been entitled to travel to the United States (see, *Dulles v. Lee Gnan Lung, supra*). Even if it be assumed that an application was submitted and denied, it would not, as appellant contends, "effectively deprive counsel of the services of his principal witness" (Br. 5). The testimony of appellant could have been obtained by deposition (Rules 26, 28, and 30, Federal Rules of Civil Procedure).

The scope of review in this Court is governed by Rule 52(a), Federal Rules of Civil Procedure, which provides in pertinent part that "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses . . ." (*United States v. United States Gypsum Co.,* 333 U. S. 364, 395 (1948); *Lee Wah Fook v. Brownell,* 218 F. 2d 924 (C. A. 9, 1955); *Attorney General of the United States v. Ricketts,* 165 F. 2d 193 (C. A. 9, 1947)).

In *Lew Wah Fook v. Brownell, supra,* this Court had occasion to place the "clearly erroneous" rule in its proper

perspective. After quoting from *United States v. United States Gypsum Co., supra,* that "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed", Judge Stephens went on to declare (p. 925):

> "* * * This simple statement *does not convert the appellate tribunals into fact finding de novo trial courts. The presumption of correctness* of the trial court, the *view of the witnesses* and the *live feel of the open forum* are all ingredients of the compound which we may adjudge as valid or 'clearly erroneous'. * * *" (Emphasis added.)

B. Lack of Documentary Evidence.

Where one such as appellant claims citizenship under Section 1993 of the Revised Statutes of the United States, he and/or his claimed relatives would normally be expected to have in their possession letters, photographs, or other documents of sufficient age to attest to the genuineness of the claimed relationship. In the case at bar the few documents that were presented to the District Court were of such recent origin that they had little or no probative value.

Plaintiff's Exhibit 5, a group photograph purporting to show appellant, his brother Yip Share Wong, and his half-brother Yip Share Leung, was not taken until September, 1949 [R. 48], just before Yip Share Leung returned to the United States [R. 40]. The photographs contained in Plaintiff's Exhibit 1, excepting one photograph purporting to represent Yip Dock, appellant's alleged father, were taken on the same date as Plaintiff's Exhibit 5 [R. 49-50], or later [see Pltf. Ex. 1]. On August 24, 1950, less than one year after these photo-

graphs were taken, Yip Share Leung executed an affidavit for the purpose of enabling appellant to travel to the United States [see Affidavit of Yip Share Leung contained in Pltf. Ex. 1]. Since the first step to bring appellant to the United States was initiated within a short time after the photographs were taken, it is not unreasonable to infer that they were taken for the purpose of being used as evidence in support of appellant's claim to citizenship. Plaintiff's Exhibit 7 falls in the same general category, although purportedly taken in 1947 [R. 159].

No letters at all were introduced which antedated the Affidavit of Yip Share Leung. Plaintiff's Exhibit 1 contains one empty envelop from a Yip Share Leung to a Yip Mai Jork, postmarked October, 1950 and one letter dated August 30, 1952. No other letters of any nature were presented to the court.

C. Testimony of Witnesses Presented by Appellant at the Original Trial.

YIP SHARE LEUNG

The testimony of Yip Share Leung not only lacks probative value, but constitutes affirmative evidence that appellant's claimed relationship does not in fact exist. This witness was allegedly appellant's half-brother [R. 38], and it was he who executed an affidavit for the purpose of enabling appellant to travel to the United States as a citizen [see, Pltf. Ex. 1 which contains this affidavit]. Normally, Yip Share Leung would have been expected to possess considerable knowledge of appellant, obtained either through personal acquaintance or through correspondence. Yet, the only occasion upon which Yip Share Leung saw appellant was in September, 1949, when the latter was 22 years of age [R. 35-36, 48,

50-51]. This meeting lasted for two or three days only [R. 47, 51].

Between 1931 and 1947, Yip Share Leung, who was then residing in the United States, did not receive a single letter either from Yip Mie Jork or from his own stepmother [R. 76, 78]; nor did the witness write any letters to Yip Mie Jork or to the village during this period [R. 45, 77]. The first letter that Yip Share Leung received from Yip Mie Jork was in 1952 [R. 76], and the first letter that the witness wrote to Yip Mie Jork, which letter he purportedly gave to one Peter Fong, was in 1947 [R. 45-46].

Yip Share Leung went to China in 1947, but it was September, 1949 before he saw appellant [R. 41, 48]. Even this meeting did not take place in the "home village", but in Macao [R. 41]. During his trip to China from 1947 to 1949 Yip Share Leung did not even visit the "home village" [R. 44]; although both his former wife and mother were buried there [R. 82], and he could have made the trip in about a day [R. 41, 82].

Yip Share Leung purportedly sent a letter and $50.00 to appellant in 1947 through one Peter Fong [R. 45-46]; however, since the witness had never sent any money to appellant before that time [R. 80], and had not even communicated with the "home village" for sixteen years, it is difficult to imagine what prompted this sudden generosity.

Moreover, a statement given by Yip Share Leung to the Immigration and Naturalization Service upon his return to the United States in 1949 further indicates that the persons whom he saw in Macao in 1949, and with whom he had photographs made, were not in fact

his half-brothers [R. 82-83]. This statement, dated December 8, 1949 is contained in Plaintiff's Exhibit 4; however, the impeaching portions thereof were read into the record [R. 83], and are quoted below:

> "Q. Where is your oldest half-brother, Yip Jeang Shing at the present time? A. I don't know. I didn't see him in China on this trip.
>
> Q. Where is your half-brother Yip Mie Jork? A. He is in Kin Mo Village, but I didn't see him on this trip either.
>
> Q. Where is your half-brother Yip Share Wong at the present time? A. He is also in the village. However I didn't see him."

If the above-quoted answers be true, then Yip Share Leung's testimony that he saw his half-brothers in Macao in 1949 and had photographs made with them was completely refuted.

Yip She Mang

Yip She Mang, appellant's alleged nephew, testified that he visited the home of Yip Mie Jork in Kin Mo Village for a period of three or four days during 1938 [R. 55-56]. The witness stated that he was then about 11 or 12 years of age [R. 56], and that Yip Mie Jork was about one year younger [R. 58]. At trial, which took place seventeen years after Yip She Mang's visit to Kin Mo Village, the witness purported to identify photographs of appellant [R. 60-61]. These photographs were taken in 1949 [R. 49-50], approximately eleven years after the witness' visit. It is highly improbable that this purported identification was based upon the witness' independent recollection of the features of Yip Mie Jork from his brief visit to Kin Mo Village in 1938. It is more probable

that such identification was based, either consciously or unconsciously, upon discussion of the photographs after Yip Share Leung, the father of Yip She Mang, brought them back from Macao in 1949 [R. 90-91].

Peter Fong

Peter Fong testified that he visited the home of Yip Mie Jork in Kin Mo Village during 1947 [R. 64], delivering a letter and $50.00 given to him by Yip Share Leung [R. 64-65]. Although Peter Fong saw Yip Mie Jork only upon this one occasion, and his visit lasted *only about fifteen minutes* [R. 66], he purported to identify a photograph of appellant as the person with whom he visited [R. 66]. That the witness' identification was based upon such a brief visit to Kin Mo Village approximately eight years before trial is extremely unlikely.

D. The Position of the District Court.

Appellee disagrees with the statement in Appellant's Brief that "the credibility of the witnesses was not seriously challenged" by the District Court (Br. 8), since the findings of that Court show the contrary. Finding of Fact No. VI reads in part as follows [R. 16-17]:

"VI.

> "The evidence adduced by the plaintiff to establish that he is the lawful blood son of Yip Dock was so scant; the witnesses who testified on behalf of the plaintiff had so little real knowledge of the claimed relationship; and the testimony of the witnesses who appeared on behalf of the plaintiff was, in many respects, *so improbable and unworthy of belief;* * * *" (Emphasis added.)

And Finding of Fact VII provides [R. 17]:

"VII.

"The plaintiff has failed to present sufficient *credible* evidence to sustain his burden of proving that he is the lawful blood son of Yip Dock." (Emphasis added.)

Thus, it may be seen that the Court below did challenge the credibility of appellant's witnesses, to such a degree that mention thereof was made in its findings. The remarks of the Court are not inconsistent with these findings. It is true that at the conclusion of the original trial, the Court indicated that it was not questioning the credibility of the three witnesses who had up to that time testified [R. 100]. However, at the end of the reopened hearings, just before ruling for a second time in favor of appellee, the District Court made it clear that the credibility of the witnesses was an important factor in its decision. At that time the Court declared [R. 200-201]:

"* * * *One of the main things in these cases is the credibility of the various witnesses.*

"The only thing the Government has to do in these cases is to try to break down the credibility of the witnesses, to see whether or not the witness is telling the truth. When we try to determine whether or not all the pieces will fall in together and will add up to the total sum or bring the conclusion we want, we have to rely upon the testimony of witnesses.

"What we are trying to do is to determine whether or not the witnesses are telling the truth, and if they are, whether or not the stories will jibe." (Emphasis added.)

It was not necessary for the District Court to brand appellant's witnesses as perjurers in order to discredit their testimony. In *Stone v. United States,* 164 U. S. 380 (1896), the Court of Claims in its opinion had stated: "The Court has no reason in this particular case, other than the lapse of time and the inaction of the claimant, to discredit the witnesses or suspect the claim." The Supreme Court in commenting upon this statement said (p. 382):

> "* * * It is true the court does not find that the witnesses have sworn falsely, *but that is not essential even when that is its belief. To say that the testimony is not satisfactory is more polite and less offensive, and at the same time equally sufficient.* * * *" (Emphasis added.)

Even if it be assumed that the remarks of the Court below were in conflict with its findings, the latter should prevail. While an oral or written opinion may be resorted to for certain purposes (*Loeb v. Columbia Township Trustees,* 179 U. S. 472 (1900); *Mar Gong v. Brownell,* 209 F. 2d 448, 450 (C. A. 9, 1954)), it may not be used to control, refute, or modify the findings of fact upon which the judgment is based.[5] (*Stone v. United States, supra; Ohlinger v. United States,* 219 F. 2d 310, 311 (C. A. 9, 1955); *American Ins. Co. v. Scheufler,* 129

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[5]In the District Court appellant objected to Finding of Fact No. VI and sought to have substituted a finding which supports the position which he now takes in his brief. The fact that the District Court overruled these objections adds emphasis to the rule that this finding should prevail over any inconsistent oral remarks. Appellant's objections to the findings were not made a part of the record, since appellee did not anticipate the position now assumed by appellant. However, these objections are being printed in the Appendix to this brief.

F. 2d 143, 146 (C. C. A. 8, 1942); cert. den. 317 U. S. 687; *Ross v. DeWitt,* 179 Cal. 272, 176 Pac. 445 (1918); 5 C. J. S. Appeal and Error, §1480e.)

E. Testimony of Witnesses Presented by Appellant at Reopened Hearings.

The findings of the District Court clearly show that it did not believe, in many respects, the testimony of the witnesses presented by appellant at the reopened hearings [R. 17];[6] and it was not required to do so, even though such testimony may have been unimpeached or not directly contradicted (*Quock Ting v. United States,* 140 U. S. 417, 420 (1891); *Wong Sho Ging v. Brownell,* 218 F. 2d 912 (C. A. 9, 1955); *Mar Gong v. Brownell,* 209 F. 2d 448, 449 (C. C. A. 9, 1954); *N. L. R. B. v. Howell Chevrolet Co.,* 204 F. 2d 79 (C. A. 9, 1953), affirmed in *Howell Chevrolet Co. v. N. L. R. B.,* 346 U. S. 482). The testimony of three of these witnesses, Leong Lan Gin, Chew Jock, and Chin Shee, deserve special comment.

LEONG LAN GIN

The District Court specifically expressed dissatisfaction with the testimony of Leong Lan Gin [R. 111, 199, 201]. The latter witness, upon whom appellant places great reliance (Br. 13-15), testified that she lived in the same village with appellant until she was 18 years of age [R. 104], went to school with him [R. 105, 108], visited his home [R. 107], and played with him [R. 108-109]. While the remarks of the District Court were confined to a few discrepancies and improbabilities in the testimony of Leong Lan Gin, it does not follow that these were the

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[6]This proposition is emphasized by the fact that the original findings made no reference to credibility [R. 11].

only factors which gave rise to its dissatisfaction. The Court below undoubtedly noted the tendency of Leong Lan Gin to volunteer testimony favorable to appellant even though such testimony was not responsive to the questions propounded. Illustrative of this tendency are the following quotations [R. 112-113]:

"Q. By Mr. Kidder: Did you have any conversation with Wong She regarding the family history of the Yip family? A. I never ask very many questions, but all I know the two boys call this Wong She mama.

Mr. Davis: I object to that as being unresponsive to the question asked. I wonder if we might ask the witness, through the interpreter, to try to contain her answers to the questions.

The Court: If you have a motion to strike, it is denied. It is up to the court to evaluate the testimony of this witness.

Q. By Mr. Kidder: Were you ever present when there was any discussion concerning the family history of Yip Mie Jork? A. In the village a young lady doesn't go into the family affairs of another family, but in the midst of my visiting with these people, I only feel that these two boys were the sons of this lady, Mrs. Wong, but usually our conversations dwelt on school accomplishments, you know, about school, what do we do in school, and so on and so forth.

The Court: May I ask the witness a question? Do you know the difference between a full brother and a half brother?

The Witness: As far as I know, they both call this woman mama.

The Court: Do you know what a half brother is?
The Witness: I don't notice it.

The Court: You don't know what a half brother means? [106]

The Witness: I understand what you mean, but I don't feel they are half brothers."

Moreover, considering the long acquaintance and friendship which the witness claimed for appellant [R. 105-115, 197], it is difficult to imagine why she should have been reluctant to testify at the original trial [R. 197-198].

Chew Jock

The testimony of Chew Jock was sufficiently impeached to justify the District Court in regarding it as a recent fabrication. At trial Chew Jock testified, among other things, that he made a trip to China in 1926 and remained there until approximately may or June, 1928 [R. 165]; that during this trip he was introduced to the wife of Yip Dock, appellant's alleged father [R. 179]; and that during March or April, 1938 he attended a dinner or baby banquet being held at Yip Dock's home for Yip Mie Jork [R. 168-169]. Chew Jock testified that during this trip the only person that he visited in China was Yip Dock [R. 181-182]; and that he was not introduced to any other person in China except to the wife of Yip Dock [R. 182].

Contrast this testimony with Defendant's Exhibit A, consisting of a statement bearing Chew Jock's signature [R. 182] dated June 13, 1928, and given by the witness to the United States Immigration Service upon his return to the United States. This statement reads in pertinent part:

"Did you visit any resident of this country who happened to be at his home during your recent

stay in China, or did you visit the home of such resident? No.

"Were you introduced to the son, daughter, or wife of any resident of this country? WONG SOO NGIT wife of JEUNG YUT SUNG, living in Ling Gong Vill, S. N. D."

Thus, in his statement of June 13, 1928, Chew Jock did not mention his claimed visit to Yip Dock's home, nor did he mention his introduction to the wife of Yip Dock. Instead, he refers to his introduction to one Wong Soo Ngit, wife of Jeung Yut Sung. This contradiction becomes even more significant when it is realized that during trial Chew Jock stated that the only person that he visited in China during his trip from 1926 to 1928 was Yip Dock [R. 181-182], and that he was not introduced to any person other than to the wife of Yip Dock [R. 182].

The statement obtained from Chew Jock by the United States Immigration Service was designed to prevent him from thereafter fabricating testimony in support of claims of citizenship. This purpose is revealed by the following additional remarks on Defendant's Exhibit A:

"(NOTE) Witness should be advised that his statements in reply to these questions will be used should he testify at any future time as to the relationship claimed to exist between an applicant for admission and a Chinese resident of the United States. Indicate compliance with above instructions by notation 'Witness so advised.' ADVISED."

Appellant suggests that Chew Jock did not know that Yip Dock was a "resident" of the United States (Br. 21). The witness' own testimony indicates otherwise. Chew

Jock testified that he first met Yip Dock in Stockton, California in 1918 [R. 166] and that he saw him many times in Wah Kwen Grocery Store in that city [R. 166-167].

Chin Shee

Upon direct examination Chin Shee testified that he went to China in 1935 and returned to the United States in 1936 [R. 154]; that on this trip he took with him certain articles which had belonged to Yip Dock, appellant's alleged father [R. 156]; and that he delivered these articles to the wife of Yip Dock in Kin Mo Village [R. 157]. While in the village, he testified that he was introduced to the children of Yip Dock, including the appellant, Yip Mie Jork [R. 157-158].

However, when Chin Shee returned to the United States in 1936, he signed a written statement to the effect that he did not take anything to anyone in China on the trip [Deft. Ex. B for identification]. While this statement was not received in evidence [R. 193], the feeble efforts of the witness to explain its contradictory contents during cross-examination afforded an adequate basis for the District Court to disregard his entire testimony [R. 190-191]:

> "Q. I am going to read to you from Defendant's Exhibit [199] B for identification and ask whether that question was asked you or whether this was the answer you gave on about December 18, 1936? 'Q. Did you take any money, letters, or anything else from the United States to anyone in China on this trip, and if so, to whom? A. No.' A. The package I brought was not a gift brought back for anybody. It was something that was inherited, left from the deceased to be conveyed back to the family. It was not a gift.

Q. Was that question asked you and was that the answer you gave? A. When they asked me the question, everybody was in a rush getting ready to get ashore at that time when the questions were asked.

Q. Was that question asked you and was that the answer you gave? A. I don't remember.

Q. You stated that the material that you carried back was an inheritance so you didn't consider that a gift? A. I classified that that way."

It will be observed that the witness first sought to justify his prior contradictory statement on the theory that the articles which he took back to China in 1935 were an inheritance rather than a gift. Next, he attempted to explain the inconsistency by stating that "when they asked me the question, everybody was in a rush getting ready to get ashore." Then, he claimed not to remember the question and answer at all [R. 191]!

F. Demeanor Evidence.

With respect to all of the witnesses who testified before the District Court, their demeanor was in evidence and was undoubtedly considered by the court (*Quock Ting v. United States,* 140 U. S. 417, 421 (1891); *Gamewell Co. v. City of Phoenix,* 216 F. 2d 928, 931 (C. A. 9, 1954); *Broadcast Music Inc. v. Havana Madrid Restaurant Corp.,* 175 F. 2d 77, 80 (C. A. 2, 1949); Wigmore on Evidence, Vol. III, Third Ed., §946).

The rule was vividly expressed in *Broadcast Music, Inc., supra,* where the Court declared (p. 80):

> "* * * *the demeanor of an orally-testifying witness is 'always assumed to be in evidence.'* It is 'wordless language' The liar's story may seem uncontradicted to one who merely reads it, yet *it may*

be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his gestures, and the like—all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned. For such a court, it has been said, even if it were called a 'rehearing court,' is *not a 'reseeing court.'* * * *" (Emphasis added.)

G. Bases of the District Court's Decision.

The decision of the District Court was not, as appellant contends, "based entirely upon the so-called 'gap' in the early history of appellant" (Br. 21). While this "gap" may have been a factor in the decision of the Court below, it was not the only factor. This is indicated by the action of the Court in overruling Appellant's Objections to Findings of Fact (see, Appendix). Here again, the findings of the District Court afford a more reliable guide. Findings of Fact Numbers VI and VII indicate that the decision of the Court below was based upon the following three grounds [R. 16-17]:

1. Appellant's evidence was scant.

2. Appellant's witnesses possessed little real knowledge of his claimed relationship.

3. Appellant's witnesses lacked credibility.

The foregoing bases fully support the decision of the District Court and are themselves supported by the record. The fact that appellant called a total of eight witnesses in the Court below, in itself, means nothing. It is not the number of witnesses presented, but the quality of their testimony, that determines the course of judicial decision.

As this Court, in *Quon v. Niagara Fire Ins. Co. of New York,* 190 F. 2d 257 (C. A. 9, 1951), had occasion to remark (p. 259):

> "* * * it is not true that the trier of the fact is bound to find in accordance with the statement of one witness *or any number of witnesses which do not satisfy his mind.* This is a stock instruction to juries. The burden of proof was on appellant. If the testimony produced lacked credibility, it was not proof even if uncontradicted. *The problem of proof cannot be resolved scientifically by quantitative analysis, as some have suggested. The Trial Judge was the arbiter.* * * *" (Emphasis added.)

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the finding of the Court below that appellant failed to sustain his burden of proving that he is the lawful blood son of Yip Dock is not clearly erroneous, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX.

[Title of District Court and Cause]

Objections to Findings of Fact.

Plaintiff objects to Finding of Fact VI contained in the document entitled "Findings of Fact and Conclusions of Law", prepared by defendant, and suggests to the Court that the following be substituted therefor:

VI.

The evidence adduced by the plaintiff to establish that he is the lawful blood son of Yip Dock was not sufficient to satisfy this Court of the claimed relationship; that the testimony of the witnesses, while not improbable or unworthy of belief, failed to produce evidence concerning the said relationship from the time of plaintiff's birth on CR 17-2-2 (February 22, 1928) until approximately September, 1936, the date when the witness Leong Lon Gin testified she first has a recollection of plaintiff; that because of this failure to produce evidence covering the aforesaid gap or chronological interruption in the family history, the plaintiff has not satisfied or convinced this Court that the person who purports to be Yip Mie Jork, and who executed an application for passport at the American Consulate General, Hong Kong, B. C. C. on September 5, 1951, is the lawful blood son of Yip Dock, or satisfied or convinced this Court that the person who purports to be Yip Mie Jork is in truth and in fact Yip Mie Jork.

Dated: August 9, 1955.

Respectfully submitted,
/s/ Marshall E. Kidder
Marshall E. Kidder
Attorney for Plaintiff.

[Endorsed]: Filed August 9, 1955.